PD-0474-18

PD-0474-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 5/7/2018 12:55 PM
Accepted 5/9/2018 1:34 PM
DEANA WILLIAMSON
CLERK

NO. _____

IN THE

FILED
COURT OF CRIMINAL APPEALS
5/9/2018
DEANA WILLIAMSON, CLERK

COURT OF CRIMINAL APPEALS

OF TEXAS
AUSTIN, TEXAS

ADRIAN JEROME PARKER, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

On Review from Cause No. 06-17-00167-CR
In the Court of Appeals For the Sixth District at Texarkana

On Appeal from Cause No. 44,950-A
In the 188th District Court of Gregg County, Texas
Honorable David Brabham, Judge Presiding

HOUGH-LEWIS ("LEW") DUNN
ATTORNEY AT LAW
P.O. BOX 2226
LONGVIEW, TX 75606
Tel. 903-757-6711
Fax 903-757-6712
Email: dunn@texramp.net
Counsel for Appellant

APPELLANT RESPECTFULLY REQUESTS ORAL ARGUMENT

IDENTITIES OF JUDGE, PARTIES, AND COUNSEL

In compliance with Rule 68.4(a), Texas Rules of Appellate Procedure, a complete list of the names of the trial judge, all parties to the judgment appealed from, and the names and addressed of all trial and appellate counsel:

Parties:	Adrian Jerome Parker, Appellant
	The State of Texas, Appellee
Trial Court Judge:	Honorable David Brabham Presiding Judge, 188th District Court Gregg County, Texas
Attorneys for Appellant:	Hough-Lewis ("Lew") Dunn Counsel on Petition for Discretionary Review and Counsel on Direct Appeal P.O. Box 2226 Longview, TX 75606
	Rick Berry Trial Counsel 111 West Austin Street Marshall, TX 75670 Pre-Trial and Trial Counsel for Appellant
	Gerald Smith Attorney at Law P.O. Box 200395 Dallas, TX 76006 Pre-Trial Counsel for Appellant
Attorneys for the State:	Carl Dorrough, Criminal District Attorney 101 East Methvin, Suite 333 Longview, TX 75606

Tanya Reed
Debbie Garrett
Assistant Criminal District Attorneys
101 E. Methvin, Suite 333
Longview, TX 75601
Trial and Pre-Trial Counsel for the State

John J. Roberts
Assistant Criminal District Attorney
101 E. Methvin, Suite 333
Longview, TX 75601
Counsel for the State of Texas on Appeal

TABLE OF CONTENTS

SECOND GROUND PRESENTED FOR REVIEW

DID THE COURT OF APPEALS REVERSIBLY ERR IN HOLDING THAT APPELLANT'S GUILTY PLEA AND STIPULATION OF EVIDENCE WERE SUFFICIENT TO PROVE THE ELEMENTS OF THE STATE'S THREE COUNTS THAT INCLUDED ALLEGATIONS OF THE PRESENCE OF CONTROLLED SUBSTABCES, DESPITE THE STATE'S FAILURE TO COMPLY WITH ARTICLE 38.41, TEX. CODE CRIM. PROC., SINCE THE IMPORTANT RIGHT OF SIXTH AMENDMENT CONFRONTATION OF WITNESSES WAS THEREBY DENIED?

INDEX OF AUTHORITIES

CASES PAGE

STATUTES AND RULES

STATUTES AND RULES PAGE

(Note: Statutory references are to Vernon's Texas Annotated Statutes for dates pertaining to the offenses.)

STATEMENT REGARDING ORAL ARGUMENT

Appellant has raised important questions and believes that oral argument would help clarify the issues presented in his petition for discretionary review. Therefore, he respectfully requests oral argument.

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

NOW COMES ADRIAN JEROME PARKER, Appellant in this cause, by and through his attorney of record, Hough-Lewis ("Lew") Dunn, and, pursuant to the provisions of TEX. R. APP. PROC., Rule 66, *et seq*, moves this Court to grant discretionary review, and in support will show as follows:

STATEMENT OF THE CASE

Appellant was charged by an indictment reciting four separate counts (CR 5):

Count I: Engaging in Organized Criminal Activity – First Degree Felony, TEX. PENAL CODE § 71.02(a).

Count II: Possession of a Controlled Substance in Penalty Group 1, in An Amount Greater than 4 Grams but Less than 200 Grams – Second Degree Felony, TEX. HEALTH & SAFETY CODE § 481.115(d).

Count III: Tampering with Physical evidence with the Intent to Impair – Third Degree Felony, TEX. PENAL CODE § 37.09(d)(1).

Count IV: Possession of a Controlled Substance in Penalty Group 1, in An Amount Greater than 1 Gram but Less than 4 Grams – Third Degree Felony, TEX. HEALTH & SAFETY CODE § 481.115(c).

Appellant waived a jury trial, pleading guilty to the trial court (5 RR 9). After the State put on its evidence, including evidence of a prior felony

conviction, (5 RR 175) Appellant received the following punishment in each count: Count I: 45 years; Count II: 45 years; Count III: 20 years; Count IV: 20 years.

STATEMENT OF PROCEDURAL HISTORY

Appellant presented seven issues in his appellate brief. The conviction was reversed in part,[1] and affirmed and reformed in part, in a memorandum opinion not designated for publication. *Adrian Jerome Parker v. The State of Texas, 2018* Tex. App. LEXIS 2536 (Tex. App. – Texarkana, April 11, 2018). No motion for rehearing was filed. This petition is due to be filed on May 11, 2018, and, therefore, is timely filed.

GROUNDS FOR REVIEW

FIRST GROUND PRESENTED FOR REVIEW

DID THE COURT OF APPEALS REVERSIBLY ERR IN HOLDING THAT EVIDENCE OF CONTROLLED SUBSTANCES WAS ADMISSIBLE FOR FAILURE TO OBJECT, DESPITE THE STATE'S FAILURE TO COMPLY WITH ARTICLE 38.41, TEX. CODE CRIM. PROC., SINCE THE IMPORTANT RIGHT OF SIXTH AMENDMENT CONFRONTATION OF WITNESSES WAS THEREBY DENIED?

[1] Count I was reversed and remanded with an acquittal.

SECOND GROUND PRESENTED FOR REVIEW

DID THE COURT OF APPEALS REVERSIBLY ERR IN HOLDING THAT APPELLANT'S GUILTY PLEA AND STIPULATION OF EVIDENCE WERE SUFFICIENT TO PROVE THE ELEMENTS OF THE STATE'S THREE COUNTS THAT INCLUDED ALLEGATIONS OF THE PRESENCE OF CONTROLLED SUBSTANCES, DESPITE THE STATE'S FAILURE TO COMPLY WITH ARTICLE 38.41, TEX. CODE CRIM. PROC., SINCE THE IMPORTANT RIGHT OF SIXTH AMENDMENT CONFRONTATION OF WITNESSES WAS THEREBY DENIED?

REASONS FOR REVIEW

Review is proper pursuant to TEX. R. APP. PROC., Rule 66.3(b) because the Court of Appeals has decided an important question of state or federal law that has not, but should be, settled by the Court of Criminal Appeals. Review is also proper pursuant to TEX. R. APP. PROC., Rule 66.3(c) because the Court of Appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Supreme Court of the United States, namely, *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), as follows:

The Court of Appeals decided, in a case with scientific evidence governed by a Texas statute governing admissibility that requires notice of such evidence, that a guilty plea and stipulation of evidence, coupled with a failure to object to the evidence, waives any error as to its admissibility, where valuable Sixth Amendment rights of confrontation are at stake.

ARGUMENT AND AUTHORITIES

FIRST GROUND: DID THE COURT OF APPEALS REVERSIBLY ERR IN HOLDING THAT EVIDENCE OF CONTROLLED SUBSTANCES WAS ADMISSIBLE FOR LACK OF AN OBJECTION, DESPITE THE STATE'S FAILURE TO COMPLY WITH ARTICLE 38.41, TEX. CODE CRIM. PROC., SINCE THE IMPORTANT RIGHT OF SIXTH AMENDMENT CONFRONTATION OF WITNESSES WAS THEREBY DENIED?

THE EVIDENCE

At trial the State, without objection from Appellant, placed into evidence the following:

State's Ex. #1: Containing Lab report dated 3-30-15 (6 RR 36)
Containing Lab report dated 2-26-15 (6 RR 38)

State's Ex. #6: Containing Lab report dated 2-29-16 (6 RR 64)
Containing Lab report dated 7-21-15 (6 RR 73)
Containing Lab report dated 7-27-15 (6 RR 109)

State's Ex. #14: Containing Lab report dated 7-24-15 (6 RR 146)
Containing Lab report dated 8-6-15 (6 RR 188)

State's Ex. #15: Containing Lab report dated 8-14-15 (Supp. RR 32)

Each of those lab reports is for an amount of cocaine. There is no report of any marihuana being submitted for analysis or any report giving the analysis of same. The lab reports were to flesh out the proof needed to support the charges of possession of the controlled substances.

ARGUMENT

On appeal Appellant framed his attack on the evidence to support his convictions upon legal insufficiency and Sixth Amendment rights, because the evidence of controlled substances never complied with the requirements of Art. 38.41, Sec. 4, TEX. CODE CRIM. PROC. That statute says, in relevant part:

> "Not later than the 20th day before the trial begins in which a certificate of analysis under this title is to be introduced, the certificate must be filed with the clerk of the court…The certificate is not admissible under Section 1 if, not later than the 10th day before the trial begins, the opposing party files a written objection to the use of the certificate with the clerk of the court…."

The Court of Appeals sought to deflect that argument (*Parker* *10) by citing to *Griffin v. State,* 491 S.W.3d 771, 783, n.3 (Tex. Crim. App. 2016). But that case in no way addresses the issue raised here, namely, that important Sixth Amendment rights of confrontation of a witness are at stake.

Several Courts of Appeals have attempted to address the legal issues involved with evidence admitted that failed to comply with Art. 38.41, Sec. 4, TEX. CODE CRIM. PROC.:

Deener v. State, 214 S.W.3d 522 (Tex. App. – Dallas 2006, pet. ref'd) holds that failure to object to such a certificate waives the right to object under the Sixth Amendment right of confrontation as interpreted in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). However, in *Deener* the certificate was filed well before the 20 day deadline and there was sufficient time before trial for a written objection to be filed, but was not.

Daniels v. State, 2017 Tex App. LEXIS 856 (Tex. App. – Texarkana Feb. 1, 2017) rejected arguments based on the confrontation clause and failure to comply with the statute; *Skinner v. State*, 2018 Tex. App. LEXIS 1228 (Tex. App. – Tyler Feb, 14, 2018), rejected a similar argument relying on the concept of waiver and judicial confession, citing to the decision in *Daniels*.

The evidence used in this case by the State – namely, lab reports containing the record of scientific testing -- is of a certain kind, namely, objectively verifiable scientific evidence for which a statutory rule of admissibility has been specifically crafted and enacted. Since that type of

evidence carries with it an aura of virtual infallibility, it is qualitatively different from other types of evidence, like eye-witness testimony which has many variables and inconsistencies. Added to this is the fact that the legislature codified the means by which such evidence is filed, with notice to the defense, so that defendants would be able, if they chose, to challenge it.

Ultimately, what is at stake is the Sixth Amendment right to confront the witness who had subjected the sample to scientific analysis. Included within that are such things as these: the credentials of the witness, education, training, experience, methodology used; the techniques used in sampling and conducting tests; the criteria developed in the scientific community for the methodology and validity of the test or tests; the accuracy and/or percent of error or variance in results; the technical tools, instruments, and equipment used and their accuracy and whether or not such instruments have been verified and calibrated to give accurate results. An entire arena of law has grown up around what is admissible scientific evidence and what is not. *See, e.g.,* such decisions as *Daubert v. Merrill Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992);

Winfrey v. State, 323 S.W.3d 875 (Tex. Crim. App. 2010).

Our courts have placed upon constitutional rights certain restrictions on waiver. The foremost -- and most analogous to Sixth Amendment confrontation in the scientific setting – is the Fifth Amendment right to counsel under custodial interrogation, i.e., *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). What is the rationale of *Miranda*? The right to counsel in that context is deemed only expressly and knowingly and voluntarily waived because the stakes are so high: the accused – in custody – is faced with giving evidence that might well send him to prison. In part the rationale was to place a check on overzealous police practices that led to a confession, the so-called "third degree" or the employment of mental or psychological as opposed to physical coercion. *Miranda* at 447-48. In other words: an abuse of power where the balance of power is squarely within the control of the State.

The Sixth Amendment right to confrontation of witnesses is no less important in the context of the State's use on scientific evidence. The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." The guarantee applies to both federal and state

prosecutions under the Fourteenth Amendment. *Pointer* v. *Texas,* 380 U. S. 400, 406; 85 S.Ct. 1065, 13 L.Ed.2d 694 (1965).

Justice Scalia wrote at some length on the historical background to the inclusion of the Confrontation Clause in the Sixth Amendment (*Crawford v. Washington*, 541 U.S. at 43-50). From this he extracted two principles: first, the prevention of hearsay or *ex parte* statements (*id.,* at 53); second, exclusion of testimony from a witness who did not appear at trial if the accused had not had an opportunity to be present to cross-examine (*id.,* at 54-57).

A few years later the U.S. Supreme Court revisited the Sixth Amendment Confrontation Clause in the case of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) in the context of scientific evidence. Once more Justice Scalia wrote for the majority, holding that laboratory reports of the analysis of contraband were, in fact, "testimonial" and therefore subject to the right of the accused to confront the authors of such reports. *(Id*., at 311.) Justice Scalia then proceeded to analyze and dispose of various arguments raised in opposition to his reasoning. (*Id.,* at 315-319.) At one point he wrote: "We do not have license to suspend the Confrontation Clause when a preferable

trial strategy is available." *Id*., at 318. He went on to say, "While it is true … that an honest analyst will not alter his testimony when forced to confront the defendant…the same cannot be said of the fraudulent analyst." (*Id.*) He further observed: "Confrontation is designed to weed out not only the fraudulent analyst but the incompetent one as well." (*Id.,* at 319.)

To the point raised here – that is, a question of notice – Justice Scalia seemed to be saying that many states have already begun to deal with this problem of confrontation of the analyst and his/her report when he wrote: "…many others [states] permit the defendant to assert (or forfeit by silence) his Confrontation Clause right **after receiving notice of the prosecution's intent to use a forensic analyst's report** …" (*Id*. at 326) (emphasis added). He goes on to discuss just how such a right must be asserted and may be waived, but in those particulars he points to the state statutes requiring prior notice. (*Id.,* at 327.)

There is one last observation by Justice Scalia that supports Appellant's position of the elevated importance of the Confrontation Clause. He stated as follows: "The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination." (*Id*., at

325) This pronouncement places the Sixth Amendment right of confrontation on an equal footing as the Sixth Amendment to trial by jury and the Fifth Amendment right against self-incrimination.

In Texas the statute requires a twenty (20) day notice period if the State is going to use certificates of analysis (lab reports), with the State providing notice to the opposing party. Art. 38.41, Sec. 4 TEX. CODE CRIM. PROC. Once that notice is received, then it is incumbent upon the defense to file objection to use of the certificates not later than the 10th day before trial.

Yet how can someone file a written objection if no notice was ever provided? If no certificate was ever filed?

The Clerk's Record in the case at bar is devoid of any such certificates. They were never filed. How was the accused ever put on notice to file an objection? He was not. The burden first lies upon the State to follow the statute. If, after filing the certificates, the defense chooses not to file an objection, well and good. They have then waived the right of confrontation. But something has to happen before that occurs, something that is incumbent on the State.

The language of the statute contains a "must": "the certificate must be filed." In other words, there is a duty on the State to file the certificates. The right of confrontation is at stake. If the State elects not to comply with the statute, that does not somehow then cast the burden of waiver or non-waiver onto the defendant.

From the State's inaction the defense is free to assume that no certificates will be used at trial. Why should the defendant presume that the certificates, if any exist, will be used at trial? The statute does not include any language to support such a presumption. Someone might say, "But this will overburden the State in compelling the filing of the certificates in every drug case, or every DWI case." To quote Justice Scalia, "We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available."

SECOND GROUND: DID THE COURT OF APPEALS REVERSIBLY ERR IN HOLDING THAT APPELLANT'S GUILTY PLEA AND STIPULATION OF EVIDENCE WERE SUFFICIENT TO PROVE THE ELEMENTS OF THE STATE'S THREE COUNTS THAT INCLUDED ALLEGATIONS OF THE PRESENCE OF CONTROLLED SUBSTANCES, DESPITE THE STATE'S FAILURE TO COMPLY WITH ARTICLE 38.41, TEX. CODE CRIM. PROC., SINCE THE IMPORTANT RIGHT OF SIXTH AMENDMENT CONFRONTATION OF WITNESSES WAS THEREBY DENIED?

Appellant incorporates herein by reference the argument, authorities, and analysis presented under the foregoing "First Ground" for

all purposes. The Sixth Court of Appeals further disposed of Appellant's contentions about the failure of the evidence to convict by simply pointing to Appellant's stipulation of evidence to support his guilty plea (*Parker* *10), citing to *Menefee v. State*, 287 S.W.3d 9, 13 (Tex. Crim. App. 2009). However, that ignores the duty that the State has under Art. 1.15, TEX. CODE CRIM. PROC. to adduce further evidence separate and apart from the guilty plea to prove the offense. That statute states, in relevant part:

"…it shall be necessary for the state to introduce evidence into the record showing the guilt of the defendant…and in no event shall a person be convicted upon his plea without sufficient evidence to support the same."

It is certainly true that case law superficially seems to support the principle that, once the trial court accepts the stipulation of evidence and a "judicial confession" (in the form found herein), that fulfills Art. 1.15, TEX. CODE CRIM. PROC. See, e.g., *Chindaphone v. State*, 241 S.W.3d 217, 219-20 (Tex. App. – Fort Worth 2007, pet. ref'd).

But what if the accused – as here – did not yield his right to confront the lab analysts, never having ever been placed on notice that such analysts' reports were a part of the evidence? Doesn't that

undermine the efficacy of the stipulation of evidence and the "judicial confession"? Aren't those instruments fundamentally flawed?

There seems to be a recurrent problem with stipulations of evidence that rely upon invalid lab reports. With some frequency the Court of Criminal Appeals – in post-conviction habeas proceedings – acts to set aside a conviction based upon faulty lab analyses and reports. *See, e.g.*, the following cases: *Ex parte Garza*, 2018 Tex. Crim. App. Unpub. LEXIS 284 (April 11, 2018); *Ex parte Cantu*, 2017 Tex. Crim. App. Unpub. LEXIS 839 (Dec. 6, 2017); *Ex parte Brooks*, 2017 Tex. Crim. App. Unpub. LEXIS 683 (Oct. 4, 2017). In each case the Court of Criminal Appeals cited to *Ex parte Mable*, 443 S.W.3d 129 (Tex. Crim. App. 2014). *Mable* rests on the fact of an involuntary plea because the defendant did not know that there was no controlled substance. Yet, it is fair to say that an equally valid rationale that underlies that finding is that the alleged "report" of the controlled substances was unreliable and legally insufficient to support the conviction.

What is the cure for such inefficiency and burdens placed upon already over-extended courts? One cure is to abide by the statute that established the means whereby such lab reports might be questioned in

the first instance – to see that the right of confrontation is knowingly and intelligently and voluntarily waived – under the notice provisions of the statute.[2] Such a remedy is what Appellant seeks in this Petition for Discretionary Review.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, ADRIAN JEROME PARKER, Appellant, prays that the Honorable Court of Criminal Appeals will grant discretionary review and, after full briefing on the merits, issue an opinion reversing the Court of Appeals' judgment and remand for further proceedings consistent with the Court's opinion.

Respectfully submitted,

/S/ Hough-Lewis Dunn
HOUGH-LEWIS ("LEW") DUNN
TEXAS STATE BAR NO. 02644600
201 E. METHVIN STREET, SUITE 102
P.O. BOX 2226
LONGVIEW, TX 75606
903-757-6711
903-757-6712
dunn@texramp.net
ATTORNEY FOR APPELLANT

[2] It should not be overlooked that none of the lab reports substantiated the presence of marihuana to support Count III, the allegation of tampering with physical evidence. There is nothing there on marihuana. How could Appellant stipulate to, or plead guilty to, tampering with something whose existence was never verified in a lab report?

CERTIFICATE OF SERVICE

I certify the foregoing *Petition for Discretionary Review* was served upon the State of Texas by sending a true and correct copy to the Criminal District Attorney of Gregg County via electronic filing to: Hon. John J. Roberts, Assistant Criminal District Attorney for Gregg County, 101 E. Methvin St. Suite 333, Longview, TX 75601, and by sending a true and correct copy via certified mail, return receipt requested, to the State Prosecuting Attorney Hon. Stacey M. Soule, State Prosecuting Attorney, P.O. Box 13046, Austin, TX 78711-3046 on the 7th day of May, 2018.

/S/ Hough-Lewis Dunn

CERTIFICATE OF COMPLIANCE

This petition complies with the typeface requirements of TEX. R. APP. P. 9.4(e), because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document complies with the word-count limitations of TEX. R. APP. P. 9.4(i) because it contains 3,040 words, excluding the parts exempted by TEX. R. APP. P. 9.4(i)(1).

/S/ Hough-Lewis Dunn

APPENDICES

APPENDIX A

Memorandum Opinion, *Parker v. State*,
2018 Tex. App. LEXIS 2536 (Tex. App. – Texarkana, April 11, 2018)

No *Shepard's* Signal™
As of: May 4, 2018 7:36 PM Z

Parker v. State

Court of Appeals of Texas, Sixth District, Texarkana

April 3, 2018, Submitted; April 11, 2018, Decided

No. 06-17-00167-CR

Reporter
2018 Tex. App. LEXIS 2536 *

ADRIAN JEROME PARKER, Appellant v. THE STATE OF TEXAS, Appellee

Notice: PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On Appeal from the 188th District Court, Gregg County, Texas. Trial Court No. 44950-A.

Core Terms

indictment, grams, Counts, trial court's judgment, criminal activity, predicate offense, deliver, controlled substance, felony, convicted, pet, possession of controlled substance, engaging, modify, conspire, commission of the offense, element of the offense, degree felony, guilty plea, hypothetically, profits, argues, issues, ref'd

Case Summary

Overview

HOLDINGS: [1]-The evidence was insufficient to show that defendant committed a qualifying predicate offense necessary to support a conviction for engaging in criminal activity, given that the underlying offense under *Tex. Health & Safety Code Ann. § 481.115(d) (2017)*, possession of a controlled substance, cocaine, with intent to deliver, was not listed as a predicate offense under *Tex. Penal Code Ann. § 71.02(a)*; [2]-Defendant signed a stipulation of evidence in which he confessed to all of the elements of possession with intent to deliver a controlled substance, cocaine, one count more than one gram but less than four grams, and one count more than four grams but less than 200 grams, plus tampering with evidence, and thus his stipulation of evidence, along with his guilty plea, was sufficient to sustain his conviction under these counts.

Outcome

Judgment reversed as to count one and judgment of acquittal rendered. Judgment affirmed and modified as to counts two, three, and four.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Deferential Review > Credibility & Demeanor Determinations

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Credibility of Witnesses

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Weight of Evidence

HN1[] **Deferential Review, Credibility & Demeanor Determinations**

In evaluating legal sufficiency of the evidence, the appellate court reviews all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. The appellate court defers to the responsibility of the fact-finder to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences

from basic facts to ultimate facts.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN2[] Procedural Due Process, Scope of Protection

Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. The hypothetically correct jury charge in any particular case is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. Due process requires that the State prove beyond a reasonable doubt every element of the crime charged. All relevant authority appears to presuppose that a crime was actually charged.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN3[] Conspiracy, Elements

A person commits an offense under *Tex. Penal Code Ann. § 71.02(a)* if he, (1) with intent to establish, maintain, or participate (a) in a combination, (b) in the profits of a combination, or (c) in a criminal street gang, (2) commits or conspires to commit (3) one or more of the specific predicate offenses listed in subsections of *§ 71.02(a)*.

Criminal Law & Procedure > Trials > Jury Instructions > Particular Instructions

Criminal Law & Procedure > Criminal Offenses > Racketeering

HN4[] Jury Instructions, Particular Instructions

Tex. Penal Code Ann. § 71.02(a) lists a number of predicate offenses, the commission of which may support a conviction under that statute. *Tex. Penal Code Ann. § 71.02(a)(1)-(18)*. The statute provides for alternative manner or means of committing an essential element of the offense of engaging in organized criminal activity. When a statute defines alternative methods of manner and means of committing an element and the indictment alleges only one of those methods, the law for purposes of the hypothetically correct charge, is the single method alleged in the indictment.

Criminal Law & Procedure > ... > Controlled Substances > Possession > Intent to Distribute

Criminal Law & Procedure > Criminal Offenses > Racketeering

HN5[] Possession, Intent to Distribute

Tex. Penal Code Ann. § 71.02(a) sets out only one predicate offense that involves the possession of a controlled substance, unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception. *Tex. Penal Code Ann. § 71.02(a)(5)*. Although possession of a controlled substance through forgery, fraud, misrepresentation, or deception is a predicate offense under *§ 71.02(a)*, the simple possession of a controlled substance with intent to deliver is not a predicate offense under the statute. Possession as spelled out in *§ 71.02(a)(5)* is not the same offense as simple possession with intent to deliver. This analysis is still sound.

Civil Procedure > Appeals > Citations, Precedence & Publication > Publication of Opinions

Governments > Courts > Judicial Precedent

HN6[] Citations, Precedence & Publication, Publication of Opinions

Although unpublished cases have no precedential value, courts may take guidance from them as an aid in developing reasoning that may be employed.

Criminal Law & Procedure > ... > Entry of Pleas > Role of Court > Factual Basis

HN7 **Role of Court, Factual Basis**

A stipulation of evidence or judicial confession, standing alone, is sufficient to sustain a conviction on a guilty plea so long as it establishes every element of the offense charged.

Criminal Law & Procedure > Trials > Entry of Judgments

Governments > Courts > Court Records

HN8 **Trials, Entry of Judgments**

The appellate court has the authority to modify the judgment to make the record speak the truth, even if a party does not raise such a problem. Tex. R. App. P. 43.2. The appellate court's authority to reform incorrect judgments is not dependent on the request of any party, nor does it turn on a question of whether a party has or has not objected in trial court; the appellate court may act sua sponte and may have a duty to do so.

Criminal Law & Procedure > Criminal Offenses > Classification of Offenses > Felonies

Criminal Law & Procedure > ... > Possession > Simple Possession > Penalties

HN9 **Classification of Offenses, Felonies**

Possession of four grams or more, but less than 200 grams, of a controlled substance in Penalty Group 1 is a second degree felony. Tex. Health & Safety Code Ann. § 481.115(d). If it is shown at a trial for a second degree felony that the defendant had previously been convicted of another felony, other than a state jail felony, punishment can fall within the range prescribed for a first degree felony. Tex. Penal Code Ann. § 12.42(b) (Supp. 2017).

Criminal Law & Procedure > Criminal Offenses > Obstruction of Administration of Justice > Evidence Tampering

Criminal Law & Procedure > Criminal Offenses > Classification of Offenses > Felonies

HN10 **Obstruction of Administration of Justice, Evidence Tampering**

Tampering with evidence while knowing that an offense has been committed is a third degree felony. Tex. Penal Code Ann. § 37.09(c) (2017).

Criminal Law & Procedure > Criminal Offenses > Classification of Offenses > Felonies

Criminal Law & Procedure > ... > Possession > Simple Possession > Penalties

HN11 **Classification of Offenses, Felonies**

Possession of one gram or more, but less than four grams, of a controlled substance in Penalty Group 1 is a third degree felony. Tex. Health & Safety Code Ann. § 481.115(d). If it is shown at a trial for a third degree felony that the defendant had previously been convicted of another felony, other than a state jail felony, punishment can fall within the range prescribed for a second degree felony. Tex. Penal Code Ann. § 12.42(a) (Supp. 2017).

Judges: Before Morriss, C.J., Moseley and Burgess, JJ. Memorandum Opinion by Chief Justice Morriss.

Opinion by: Josh R. Morriss III

Opinion

MEMORANDUM OPINION

Adrian Jerome Parker rendered his open guilty plea to the trial court in Gregg County, on all four counts of the indictment against him, and pled true to a sentence-enhancement allegation. The trial court found Parker guilty of all four charges, found the enhancement allegation true, and sentenced Parker to forty-five years' imprisonment on each of Count I (engaging in organized criminal activity[1]) and Count II (possession with intent to deliver a controlled substance, cocaine, in an amount of four grams or more, but less than 200 grams[2]), and to

---

[1] *See* Tex. Penal Code Ann. § 71.02(a) (West Supp. 2017).

[2] *See* Tex. Health & Safety Code Ann. § 481.115(d) (West 2017).

twenty years' imprisonment on each of Count III (tampering with evidence[3]) and Count IV (possession with intent to deliver a controlled substance, cocaine, in an amount of one gram or more, but less than 4 grams[4]). Parker's four sentences have been set to run concurrently.

On appeal, Parker challenges the sufficiency of evidence to support his conviction under each of the four counts.[5] We reverse and render the judgment in part, **[*2]** modify it in part, and affirm it in part. We reach that result because (1) there is insufficient evidence to support Parker's conviction under Count I; (2) sufficient evidence supports Parker's conviction under Counts II, III, and IV; and (3) the trial court's judgment should be modified to accurately reflect the statutes of offenses and their degrees.

In pleading guilty, Parker admitted to having committed the actions alleged in the indictment. He also stipulated the evidence, which, as to Count I, admitted that Parker,

> [w]ith the intent to establish, maintain, or participate in a combination or in the profits of a combination, said combination consisting of [Parker], and Ladelsha Price and Christopher Crosby, who collaborated in carrying on the hereinafter described criminal activity, conspire to commit the offense of Possession of a Controlled Substance with Intent to Deliver by agreeing with each other that Christopher Crosby would engage in conduct that constituted said offense, and [Parker] and Ladelsha Price performed an overt act in pursuance of said agreement, to-wit: providing a location for the possession of said controlled substance . . . .

To support Parker's plea, the State **[*3]** introduced twenty-one separate exhibits, including (1) a stipulation of evidence, (2) investigative folders containing, *inter alia*, investigative reports and laboratory reports for substances collected on various dates concluding that each substance was cocaine of various amounts, (3) video recordings of statements given by Parker and his associates, (4) surveillance photographs and video recordings, and (5) a certified copy of the judgment of conviction concerning Parker's prior felony conviction.

HN1[↑] In evaluating legal sufficiency of the evidence, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Brooks v. State, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010)* (plurality op.) (citing *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*); *Hartsfield v. State, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd)*. We defer to the responsibility of the fact-finder "to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)* (citing *Jackson, 443 U.S. at 318-19*); *Clayton v. State, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)*.

HN2[↑] Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)*. The "hypothetically correct" jury charge in any particular case is "one that accurately **[*4]** sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id.* Due process requires that the State prove beyond a reasonable doubt every element of the crime charged. *Gollihar v. State, 46 S.W.3d 243, 246 (Tex. Crim. App. 2001)* (citing *Jackson, 443 U.S. at 319*). All relevant authority appears to presuppose that a crime was actually charged.

(1) There Is Insufficient Evidence to Support Parker's Conviction under Count I

Parker challenges the sufficiency of the evidence supporting his conviction under Count I, engaging in organized criminal activity. Parker argues, and the State does not dispute, that the State purportedly charged him with, and he was convicted of, violating *Section 71.02(a) of the Texas Penal Code*. ***HN3***[↑] A person commits an offense under *Section 71.02(a)* if he, (1) with intent to establish, maintain, or participate (a) in a combination, (b) in the profits of a combination, or (c) in a criminal street gang, (2) commits or conspires to commit (3) one or more of the specific predicate offenses listed in

---

[3] *See* *Tex. Penal Code Ann. § 37.09(d)(1)* (West 2016).

[4] *See* *Tex. Health & Safety Code Ann. § 481.115(c)* (West 2017).

[5] Although Parker presents to us seven issues, all of his issues, except his issue number three addressing due process, which we do not reach, are arguments in support of his challenge to the sufficiency of the evidence to support his conviction under one or more of the counts in the indictment.

subsections of Section 71.02(a) of the Texas Penal Code. Tex. Penal Code Ann. § 71.02(a). Parker points out, however, that the underlying offense that he allegedly committed is not one of the predicate offenses **[*5]** listed under Section 71.02(a). Therefore, he argues, the State's proof of an essential element of engaging in organized criminal activity failed.

In its brief, the State acknowledges that the conduct described in Count I does not describe organized criminal activity and that evidence of the conduct alleged in Count I, whether sufficient or not, should not normally lead to a conviction under that statute. Nevertheless, the State argues that Parker waived his complaint because he did not object to the form or substance of the indictment at trial, citing Article 1.14 of the Texas Code of Criminal Procedure. *See* Tex. Code Crim. Proc. Ann. § 1.14(b) (West 2005) (defendant who does not object to defect in form or substance of indictment before date of trial on merits waives right to object to that defect). The State misinterprets Parker's argument. Parker does not challenge the validity of the indictment; rather, he contends that the evidence was legally insufficient to convict him of an offense under Section 71.02(a) of the Texas Penal Code, as alleged by the State in its indictment. *See* Miles v. State, 357 S.W.3d 629, 632 n.11 (Tex. Crim. App. 2011). We agree.

Our first step in analyzing Parker's complaint is determining what would be included in the hypothetically correct jury charge, as authorized by the indictment. ***HN4***[↑] As previously noted, Section 71.02(a) of the Texas Penal Code lists a number of predicate offenses, the commission of **[*6]** which may support a conviction under that statute. *See* Tex. Penal Code Ann. § 71.02(a)(1)-(18). As such, the statute provides for alternative "manner or means" of committing an essential element of the offense of engaging in organized criminal activity. *See* Curry v. State, 30 S.W.3d 394, 403 (Tex. Crim. App. 2000). "[W]hen [a] statute defines alternative methods of manner and means of committing an element and the indictment alleges only one of those methods, 'the law' for purposes of the hypothetically correct charge, is the single method alleged in the indictment." Gollihar, 46 S.W.3d at 255 (citing Curry, 30 S.W.3d at 405).

Under Count I of the indictment, the State alleged that Parker

> did . . . with the intent to establish, maintain, or participate in a combination or in the profits of a combination, . . . conspire to commit the offense of Possession of a Controlled Substance in an Amount of Four Grams or More but Less than 200 Grams with Intent to Deliver . . . .

Thus, the alleged predicate offense set forth by the indictment is possession of a controlled substance, with intent to deliver, in an amount of four grams or more, but less than 200 grams. The State does not dispute that this is the alleged predicate offense for which Parker was tried. Therefore, the hypothetically correct jury charge in this case, which is authorized **[*7]** by the indictment and adequately describes the offense for which Parker was tried, would require the State to prove beyond a reasonable doubt that Parker (1) with intent to establish, maintain, or participate (a) in a combination, or (b) in the profits of a combination, (2) conspired to commit (3) the offense of possession of a controlled substance with intent to deliver.

Parker pled guilty to committing the actions alleged in the indictment, including those of Count I. He also stipulated the evidence as to Count I:

> With the intent to establish, maintain, or participate in a combination or in the profits of a combination, said combination consisting of [Parker], and Ladelsha Price and Christopher Crosby, who collaborated in carrying on the hereinafter described criminal activity, conspire to commit the offense of Possession of a Controlled Substance with Intent to Deliver by agreeing with each other that Christopher Crosby would engage in conduct that constituted said offense, and [Parker] and Ladelsha Price performed an overt act in pursuance of said agreement, to-wit: providing a location for the possession of said controlled substance . . . .

HN5[↑] Section 71.02(a) of the Texas Penal Code sets out only one predicate offense that **[*8]** involves the possession of a controlled substance, "unlawful possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation, or deception . . . ." Tex. Penal Code Ann. § 71.02(a)(5); *see* State v. Foster, No. 06-13-00190-CR, 2014 Tex. App. LEXIS 5877, 2014 WL 2466145, at *1-2 (Tex. App.—Texarkana June 2, 2014, pet. ref'd) (mem. op., not designated for publication). In *Foster*, we held that, although *possession* of a controlled substance *through forgery, fraud, misrepresentation, or deception* is a predicate offense under Section 71.02(a), the simple *possession* of a controlled substance *with intent to deliver* is not a predicate offense under the statute. Foster, 2014 Tex. App. LEXIS 5877, 2014 WL 2466145, at *2 (citing Tex. Penal Code Ann. § 71.02(a)(5), (5-a));

see also Hughitt v. State, Nos. 11-15-00277-CR, 11-15-00278-CR, 2018 Tex. App. LEXIS 1082, 2018 WL 827227, at *3 (Tex. App.—Eastland Feb. 8, 2018, pet. filed) (accord); Walker v. State, No. 07-16-00245-CR, 2017 Tex. App. LEXIS 2817, 2017 WL 1292006, at *3 (Tex. App.—Amarillo Mar. 30, 2017, pet. granted) (mem. op., not designated for publication) (accord).[6] We also held in *Foster* that possession as spelled out in Section 71.02(a)(5) of the Texas Penal Code is not the same offense as simple possession with intent to deliver. *See* Foster, 2014 Tex. App. LEXIS 5877, 2014 WL 2466145, at *2. We believe the analysis in *Foster* is still sound.

Therefore, even assuming that the State has proven beyond a reasonable doubt all of the elements of Count I it had charged in this case, the allegedly underlying offense for which Parker was tried is not a predicate offense under **[*9]** Section 71.02(a) of the Texas Penal Code.[7] Consequently, the evidence is legally insufficient to show that Parker committed a qualifying predicate offense necessary to support a conviction for engaging in organized criminal activity under Count I. Therefore, the evidence is insufficient to support Parker's conviction under Count I.[8]

Accordingly, we sustain Parker's first and second issue.[9] Therefore, we reverse the trial court's judgment insofar as it convicts Parker of engaging in organized criminal activity and render a judgment of acquittal on that charge.

(2) Sufficient Evidence Supports Parker's Conviction under Counts II, III, and IV

In his fourth, fifth, sixth, and seventh issues, Parker challenges the sufficiency of the evidence to support his conviction under Counts II, III, and IV. Parker argues that since the laboratory reports introduced into evidence (1) show that no substance tested was marihuana and (2) were not certified as required by the Texas Code of Criminal Procedure,[10] there was no evidence of an essential element of each of his convicted offenses. In addition, Parker argues that no evidence shows that he concealed any evidence.

We have previously rejected the argument that a laboratory analysis that **[*10]** lacks a certificate of analysis pursuant to Article 38.41 of the Texas Code of Criminal Procedure is not evidence. Daniels v. State, No. 06-16-00102-CR, 2017 Tex. App. LEXIS 856, 2017 WL 429602, at *2 (Tex. App.—Texarkana Feb. 1, 2017, no pet.) (mem. op., not designated for publication).[11] Here, the laboratory analyses were introduced without objection. Although the improperly certified analyses may have been hearsay, since they were admitted without objection, they had probative value. Griffin v. State, 491 S.W.3d 771, 781 n.3 (Tex. Crim. App. 2016) (citing Tex. R. Evid. 802).

Further, ***HN7***[↑] "a stipulation of evidence or judicial confession, standing alone, is sufficient to sustain a conviction on a guilty plea so long as it establishes

---

[6] ***HN6***[↑] Although unpublished cases have no precedential value, we may take guidance from them "as an aid in developing reasoning that may be employed." Carrillo v. State, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, pet. ref'd).

[7] Parker's stipulation of evidence also fails to support his conviction under Count I. A stipulation of evidence will sustain a conviction on a guilty plea only if it establishes all of the elements of the offense. Menefee v. State, 287 S.W.3d 9, 13 (Tex. Crim. App. 2009). In his stipulation of evidence regarding Count I, the only predicate conduct Parker confessed to committing was conspiring to commit possession of a controlled substance with intent to deliver. Therefore, his stipulation of evidence did not establish all of the elements of the offense of engaging in organized criminal activity.

[8] When we find that the evidence is insufficient to support a conviction of the offense charged, we are normally required to determine whether there is sufficient evidence to convict the defendant of a lesser-included offense. *See* ***Thornton v. State, 425 S.W.3d 289, 299-300 (Tex. Crim. App. 2014)***. As pertaining to this case, "[a]n offense is a lesser included offense if . . . it is established by proof of the same or less than all the facts required to establish the commission of the offense charged." Tex. Code Crim. Proc. Ann. art. 37.09(1) (West 2006). Therefore, to be a lesser-included offense requires that a greater-inclusive offense has been charged. In this case, Count I of the indictment failed to charge an offense. Consequently, since no greater-inclusive offense has been charged, there can be no lesser-included offense.

[9] Since we have sustained Parker's first and second issues, we need not consider his third issue, asserting a violation of Parker's right to due process from being convicted for an act that is not a crime.

[10] *See* Tex. Code Crim. Proc. Ann. art. 38.41, § 1 (West Supp. 2017).

[11] Although unpublished opinions have no precedential value, we may take guidance from them "as an aid in developing reasoning that may be employed." Carrillo v. State, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, pet. ref'd).

every element of the offense charged." *Daniels, 2017 Tex. App. LEXIS 856, 2017 WL 429602, at *2* (citing *Menefee, 287 S.W.3d at 13*). In this case, Parker signed a stipulation of evidence in which he confessed to all of the elements of the offenses charged in Counts II, III, and IV of the indictment. Therefore, his stipulation of evidence, along with his guilty plea, was sufficient to sustain his conviction under these counts. *Menefee, 287 S.W.3d at 13*. Consequently, we overrule Parker's fourth, fifth, sixth, and seventh issues.

(3) The Trial Court's Judgment Should Be Modified to Accurately Reflect the Statutes of Offenses and their Degrees

HN8[] We have the authority to modify the judgment to make the record speak the truth, even if a party does not raise such a problem. *Tex. R. App. P. 43.2*; *French v. State, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992)*; *Rhoten v. State, 299 S.W.3d 349, 356 (Tex. App.—Texarkana 2009, no pet.)*. "Our authority **[*11]** to reform incorrect judgments is not dependent on the request of any party, nor does it turn on a question of whether a party has or has not objected in trial court; we may act sua sponte and may have a duty to do so." *Rhoten, 299 S.W.3d at 356* (citing *Asberry v. State, 813 S.W.2d 526, 531 (Tex. App.—Dallas 1991, writ ref'd)*); *see French, 830 S.W.2d at 609*.

We notice that the trial court's judgment incorrectly labels the level of Parker's offenses and misidentifies the Texas Penal Code section of Parker's conviction under Count III. Therefore, we will modify the trial court's judgment to speak the truth. ***HN9***[] Possession of four grams or more, but less than 200 grams, of a controlled substance in Penalty Group 1 is a second degree felony. *Tex. Health & Safety Code Ann. § 481.115(d)*. If it is shown at the trial for a second degree felony that the defendant had previously been convicted of another felony, other than a state jail felony, punishment can fall within the range prescribed for a first degree felony. *Tex. Penal Code Ann. § 12.42(b)* (West Supp. 2017). ***HN10***[] Tampering with evidence while knowing that an offense has been committed is a third degree felony. *Tex. Penal Code Ann. § 37.09(c)* (West 2017). ***HN11***[] Possession of one gram or more, but less than four grams, of a controlled substance in Penalty Group 1 is also a third degree felony. *Tex. Health & Safety Code Ann. § 481.115(d)*. If it is shown at the trial for a third degree felony that the defendant had previously **[*12]** been convicted of another felony, other than a state jail felony, punishment can fall within the range prescribed for a second degree felony. *Tex. Penal Code Ann. § 12.42(a)* (West Supp. 2017). The State's enhancement allegation in this case was used to enhance Parker's punishment range. However, this procedure does not increase the level of the original offense. In addition, under Count III of the indictment, Parker was charged under *Section 37.09(d)(1) of the Texas Penal Code*. *See**Tex. Penal Code Ann. § 37.09(d)(1)*.

For the reasons stated, as to Count I, we reverse the trial court's judgment and render a judgment of acquittal. As to Counts II, III, and IV, we modify the trial court's judgment to reflect the degree of offense under Count II as a second degree felony, to reflect the degree of offense under Counts III and IV as a third degree felony, and to reflect that the statute for the offense under Count III is *Section 37.09(d)(1) of the Texas Penal Code*.

We reverse the trial court's judgment as to Count I and render a judgment of acquittal on that Count. We affirm the trial court's judgment, as above modified, as to Counts II, III, and IV.

Josh R. Morriss III

Chief Justice

Date Submitted: April 3, 2018

Date Decided: April 11, 2018

Do Not Publish

End of Document

APPENDIX B

Judgment, *Parker v. State,* No. 06-17-00167-CR
(Tex. App. – Texarkana, April 11, 2018)

Court of Appeals
Sixth Appellate District of Texas

J U D G M E N T

Adrian Jerome Parker, Appellant

No. 06-17-00167-CR v.

The State of Texas, Appellee

Appeal from the 188th District Court of Gregg County, Texas (Tr. Ct. No. 44950-A). Opinion delivered by Chief Justice Morriss, Justice Moseley and Justice Burgess participating.

As stated in the Court's opinion of this date, we find there was partial error in the judgment of the court below. Therefore, as to Count I, we reverse the trial court's judgment and render a judgment of acquittal. As to Counts II, III, and IV, we modify the trial court's judgment to reflect the degree of offense under Count II as a second degree felony, to reflect the degree of offense under Counts III and IV as a third degree felony, and to reflect that the statute for the offense under County III is Section 37.09(d)(1) of the Texas Penal Code. As modified, the judgment of the trial court as to Counts II, III, and IV is affirmed.

We note that the appellant, Adrian Jerome Parker, has adequately indicated his inability to pay costs of appeal. Therefore, we waive payment of costs.

RENDERED APRIL 11, 2018
BY ORDER OF THE COURT
JOSH R. MORRISS, III
CHIEF JUSTICE

ATTEST:
Debra K. Autrey, Clerk